83-223

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CASE NO.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1982

JOHN DUGGAN,

Petitioner,

v.

THOMAS BERDIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In April, 1974, Respondent, Berdin, was discharged from his employment with the City of Florida City, Florida by Petitioner, Duggan, the Mayor of Florida City. Florida City is a tiny municipality in Dade County, Florida with a population of approximately 5,000. The actions of Duggan were admittedly performed in the course and scope of his duties as Mayor and were admittedly performed by Duggan in good faith. (APP. 13) Berdin brought suit in the United States District Court for the Southern District of Florida under 42 U.S.C. §1983 and the First and Fourteenth Amendments to the United States Constitution, against Duggan and the City of Florida City, Florida alleging that Berdin was wrongfully discharged from employment for exercising his right to free speech.[1] Duggan's Motion for Summary Judgment on the basis that his actions were performed in good faith was denied pending a determination as to whether, in fact, Duggan's actions were performed in good faith. (APP. 32). The District Court found for Defendants but granted Berdin's Motion for Rehearing and reversed itself ruling against Duggan and Florida City. In announcing his ruling orally, the District Court held specifically that Duggan's actions, performed back in April, 1974, preceded the vast majority of case law recently developed under 42 U.S.C. §1983 and therefore Duggan could not have known that his actions with respect to Berdin's First Amendment Rights which were actionable under 42 U.S.C. §1983. (APP. 28) However, the District Court clearly misinterpreted this Court's opinion in *Owen v. City of Independence, Missouri*,

[1]The City of Florida City, Florida was a Defendant in the U.S. District Court and an Appellant in the U.S. Court of Appeals but is not a party to this Petition.

et al., 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) by holding that *Owen, supra.* abolished any good faith defense which city officials previously enjoyed in actions brought under 42 U.S.C. §1983. (APP. 28)

On appeal, the Eleventh Circuit Court of Appeals ruled that the speech between Berdin and Duggan was a private communication. (APP. 12) The Court correctly noted that this Court extended the protection of the First Amendment and thus, liability under 42 U.S.C. §1983 to private communications between employer and employee for the first time in the case of *Givhan v. Western Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Nevertheless, the Court held that Duggan should have known in April, 1974 that this Court would expand the protection of the First Amendment to private communications some five years later. (APP. 15) Is a public official liable for compensatory and punitive damages under 42 U.S.C. §1983 if his actions in discharging an employee were undeniably performed in the course and scope of his duties, in good faith and when the firing occurred five years prior to any case which held that private expressions between employer and employee are protected under the First Amendment?

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CASE NO.

in the Supreme Court of the United States

OCTOBER TERM, 1982

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

OPINIONS OF THE COURT

1. Opinion of the United States District Court for the Southern District of Florida rendered on October 30, 1980, unreported, set forth verbatim in APP.

2. Opinion of the United States Court of Appeals, Eleventh Circuit, rendered in April 1, 1983 reported at 701 F2d. 909, a verbatim copy of which is attached at APP.

3. Order Denying Motion for Rehearing of the United States Court of Appeals, Eleventh Circuit, rendered on June 13, 1983, unreported, verbatim transcript at APP.

BASES OF FEDERAL JURISDICTION

Jurisdiction in support of this Petition for Writ of Certiorari is based upon 28 U.S.C. §1254(1). The date of the Opinion and Judgment of the United States Court of Appeal, Eleventh Circuit, sought to be reviewed was filed April 1, 1983, (APP. 2) [which became effective and final upon denial of the Motion for Rehearing on June 13, 1983] as augmented by its Order Denying Motion for Rehearing dated June 13, 1983, (APP. 20).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES WHICH THE CASE INVOLVES

The Constitution of the United States, Amendment I —Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

42 U.S.C. §1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE AND FACTS

In April, 1974, Petitioner, acting as Mayor of the City of Florida City, Florida, inspected a Little League basball field being readied by a few of the city's maintenance men. When asked by Petitioner, "How are you boys doing?", the Respondent replied, "We could do better if we had a few more men." (APP. 8) At this point, Respondent claimed that Petitioner fired him. Petitioner disputes this but the trial court found for Respondent on this question of fact. (APP. 9 n.2)

Respondent brought this action in the United States District Court for the Southern District of Florida against Petitioner and the City of Florida City, Florida claiming that he was wrongfully discharged from employment for expressing his opinion in violation of the First and Fourteenth Amendments to the United States Constitution and sought damages pursuant to 42 U.S.C. §1983. Petitioner moved for summary judgment on the basis that his actions were performed in good faith. The motion was denied pending the factual determination of whether Petitioner had acted in good faith. (APP. 32)

After a lengthy trial, the Court found for Defendants on the basis that Respondent's speech did not deal with matters of public concern. The trial court granted Respondent's Motion for Rehearing and heard testimony directed to the issue of whether Respondent's speech dealt with matters of public concern. After rehearing, the trial court found for Respondent and against Petitioner and the City. In announcing its decision, the Court held that notwithstanding that Petitioner's actions occurred prior to the development of much of the case law under

42 U.S.C. §1983 (APP. 28, 29), that Petitioner's good faith immunity no longer existed by virtue of this Court's holding in *Owen v. City of Independence, Missouri, et al.*, 445 U.S. 622, 100 S.Ct. 1398, 63L.Ed.2d 673 (1980). The trial court ruled that *Owen, supra.* abolished good faith as an available defense on the part of city officials. (APP. 28)

Inasmuch as this interpretation of *Owen, supra.* was clearly erroneous, Petitioner appealed to the United States Court of Appeals, Eleventh Circuit. *Owen, supra.* provided that good faith was available to city officials as a defense to actions brought under §1983. By the time the Eleventh Circuit was ready to rule, this Court handed down its opinion in *Harlow v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), which altered an official's defense from the subjective test of good faith to the objective test of whether the official violated any clearly established law in discharging an employee.

The Eleventh Circuit found that the conversation between Petitioner and Respondent was a private rather than a public expression of speech. (APP. 12 n.8). The Court cited this Court's opinion in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), which was the first case to hold public officials liable under §1983 for discharging an employee based upon a private expression of speech. The Court concluded by finding that Petitioner violated clearly established law in firing Respondent and despite the absence of any hostility or bad faith. (APP. 13) Petitioner should be held liable for compensatory and punitive damages.

Petitioner's Motion for Rehearing was denied by the Eleventh Circuit. (APP. 20)

GROUNDS FOR INVOKING JURISDICTION OF THE UNITED STATES SUPREME COURT

In holding Petitioner liable for compensatory and punitive damages, the opinion of the Eleventh Circuit is in direct conflict with this Court's holding in *Harlow, supra.* In *Harlow, supra.*, this Court held that a public official should not be held accountable for later developments in the case law under 42 U.S.C. §1983. The Eleventh Circuit held in this case that Petitioner should have known in April, 1974 that the private expression of speech by Respondent to Petitioner was constitutionally protected. However, it was not until *Givhan, supra.* was decided on January 9, 1979, that this Court extended First Amendment protection and §1983 liability to private expressions of speech.

ARGUMENT

In the nine years since the private exchange between Petitioner and Respondent which led to this action occurred and the submission of this Petition for Certiorari, the law regarding cases brought under 42 U.S.C. §1983 has undergone drastic change. By the time the trial court was ready to rule in June, 1980, *Owen, supra.*, had just been decided and this Court had concluded that as between the city official who performed his duties in good faith and the city itself, that any loss suffered by an injured employee would best be paid by the populace as a whole rather than the individual official. The trial court completely misinterpreted the reasoning in *Owen, supra.* by holding that *Owen, supra.*

abolished good faith as a defense of public officials. (APP. 28) Clearly, *Owen, supra.* held that public officials did enjoy a qualified immunity if their actions were performed in good faith.

On appeal, Petitioner argued that he was entitled to immunity based upon his proven defense of good faith. The Eleventh Circuit found that Petitioner's actions were not performed based upon anger or hostility. (APP. 13) Nevertheless, by the time the Appeals Court was prepared to rule, this Court handed down its opinion in *Harlow, supra. Harlow, supra.* changed the test for determining an official's defense from the subjective test of good faith to the objective one of did the official violate clearly established law.

The Eleventh Circuit concluded that the conversation between Petitioner and Respondent was a *private rather than a public expression of speech.* (APP. 12 n.8)

The Appeals Court went on to note that the first case in which a private expression was found actionable was *Givhan, supra.*, decided by this Court on January 9, 1979. Despite the fact that the conversation between Petitioner and Respondent occurred five years prior to *Givhan, supra.*, the Eleventh Circuit concluded that Petitioner violated Respondent's clearly established rights.

This Court in *Harlow, supra.* held:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal

> developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. *Harlow, supra.* at 2739.

In April, 1974, when the private conversation between Petitioner and Respondent occurred, there was not a single case decided where an employee's private expression was held actionable against a public official or a public entity. Obviously, there was no clearly established law in April, 1974 which held that Respondent's private speech was protected.

In holding that Petitioner should have known that he was violating Respondent's clearly established rights, the Eleventh Circuit cited the following cases: *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d. 548 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). These cases all involved *public not private expressions of speech* between public officials and employees.

The trial court specifically noted in its ruling that the conversation between Petitioner and Respondent occurred prior to the vast majority of cases that held that discharging an employee in situations such as these would render an official liable under 42 U.S.C. §1983. (APP. 28, 29)

In *Harlow, supra.*, this Court explained its decision as hopefully limiting the large number of insubstantial claims brought to trial under 42 U.S.C. §1983. *Harlow, supra.* at 2730. The Eleventh Circuit has, by its opinion

in this case, vastly expanded the liability of public officials who discharge an employee in good faith. If the opinion of the Eleventh Circuit is permited to stand, no public official will be able to assert a qualified immunity for actions which occurred after *Keyishian, supra.* in 1967 as it can always be held that the law regarding liability for firings under 42 U.S.C. §1983 was clearly established.

Respondent has received back pay and attorney fees and costs from the City of Florida City. To allow punitive damages to stand against Petitioner in this case would be gross injustice. Petitioner's actions were admittedly performed in good faith and preceded any case law holding private expressions by employees actionable by five years.

CONCLUSION

The opinion of the Eleventh Circuit is in direct conflict with this Court's opinion in *Harlow, supra.* in that the Eleventh Circuit has ruled that Petitioner should have anticipated future developments in the case law as determined by this Court five years after the action complained of by Respondent.

Petitioner respectfully suggests that this Court assume jurisdiction of this case to firmly establish that public officials sued under 42 U.S.C. §1983 are not to be held accountable for developments in the law which occurred *subsequent* to the events which form the basis of the suit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that 3 copies of the Petition for Writ of Certiorari together with 3 copies of the Appendix was furnished by mail to the following on this day of August, 1983.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5259

D.C. Docket No. 76-645-CIV-JE

THOMAS BERDIN, ET AL.,
Plaintiffs-Appellees,
Cross-Appellants

versus

JOHN DUGGAN, ET AL.,
Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

Before HILL and CLARK, Circuit Judges, and SCOTT*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

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***Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.**

of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants/cross-appellees pay to plaintiffs-appellees/cross-appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1983

ISSUED AS MANDATE:

Thomas BERDIN, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

John DUGGAN, et al.,

Defendants-Appellants, Cross-Appellees.

No. 81-5259.

United States Court of Appeals,
Eleventh Circuit.

April 1, 1983.

Civil rights action was brought by former city employee against mayor and city alleging that he had been discharged for exercising his First Amendment right to speak. The United States District Court for the Southern District of Florida at Miami, Joe Eaton, J., entered final judgment in favor of plaintiff against both defendants, and cross appeals were taken. The Court of Appeals, Clark, Circuit Judge, held that: (1) city's interest in efficiency of services did not outweigh interest of city employee in free speech concerning city maintenance and thus employee's speech to mayor was constitutionally protected; (2) mayor should have known that firing employee for exercising his First Amendment right to speak was impermissible exercise of mayor's discretionary power and thus mayor was not protected by qualified immunity; and (3) mayor's actions constituted

official city policy and thus city could also be held liable for firing.

Affirmed.

1. **Officers and Public Employees—72(1)**

Once employee has shown that his remarks were motivating factor in decision to terminate and that remarks were constitutionally protected, burden of proof shifts to government to show by preponderance of evidence that it would have reached same decision to discipline employee in absence of protected speech. U.S.C.A. Const. Amend. 1.

2. **Constitutional Law—90.1(1)**

Whether a public employee's speech is constitutionally protected is determined by balancing of employee's interest in free speech and state's interest in promoting efficiency of public services performed through its employees; this balancing test applies equally to private and public expressions by public employee. U.S.C.A. Const. Amend. 1.

3. **Constitutional Law—90.1(1)**

Fact that city employee's expression was directed to mayor privately did not render his speech outside purview of the First Amendment.

4. **Constitutional Law—90.1(1)**

Balancing of public employee's interest in free speech and state's interest in promoting efficiency of

public services performed through its employees involves considerations such as whether speech was directed toward person with whom employee would normally be in contact in course of his daily work, whether statements tended to interfere with internal discipline, and whether speech concerned matter of public interest. U.S.C.A. Const. Amend. 1.

5. Constitutional Law—90.1(1)

Where mayor and city employee did not normally come in contact during course of daily work, where no anger or hostility existed between the two, where employee's speech concerning city maintenance did not result in internal discipline problem or disharmony, and where employee's speech was on matter of public concern, city's interest in efficiency of services did not outweigh interest of public employee in free speech and thus city maintenance employee's speech was constitutionally protected. U.S.C.A. Const. Amend. 1.

6. Civil Rights—13.10

Municipality may not assert good faith of its agents as defense to liability in a section 1983 action. 42 U.S.C.A. §1983.

7. Civil Rights—13.5(3)

Disciplining of public employee for exercising his First Amendment right to speak contravened established law and thus mayor, who should have known that his action in firing city employee was an impermissible exercise of his discretionary power in violation of

employee's First Amendment rights, was not protected by qualified immunity for firing employee for his remarks concerning city maintenance. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 1.

8. Civil Rights—13.8(1)

Defense of qualified immunity is unavailable to government officials who, though otherwise covered, act in such a manner as to violate clearly established statutory or constitutional law. 42 U.S. C.A. §1983.

9. Civil Rights—13.14

Question whether city delegated to mayor final authority to make personnel decisions was question of fact for trial judge in first instance in civil rights action brought by former city employee. 42 U.S.C.A. §1983.

10. Civil Rights—13.7

In light of ordinance granting mayor authority over city employees with unlimited power to hire and fire, mayor's action in firing city employee for his remarks that city maintenance crew could do much better if they had more workers constituted official policy of city, thus rendering it liable for First Amendment violation. 42 U.S.CA. §1983; U.S.C.A Const.Amend. 1.

Appeals from the United States District Court for the Southern District of Florida.

Before HILL and CLARK, Circuit Judges, and SCOTT*, District Judge.

CLARK, Circuit Judge:

Thomas Berdin was employed by the city of Florida City as a worker on its maintenance crew for many years.[1] Berdin's job consisted of maintaining certain areas of the city by mowing grass, cleaning streets, picking up trash, and trimming hedges and trees. In December 1973, the crew was also assigned to maintain the baseball field and the city hired no new employees.

Appellant John Duggan was the mayor of Florida City at the time in issue. On April 11, 1974, Mayor Duggan visited the baseball field and approached the three-man maintenance crew, saying, "How you boys doing?" Berdin replied that they could do much better if they had a couple of more workers. Mayor Duggan responded, "What, is it too much for you?" Berdin replied that the crew was doing all it could but that they could make a better showing if they had more workers.

At this point, Mayor Duggan walked away. He stood aside for a moment, returned to where Berdin was working, and stated, "You don't run my job. I am

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*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

[1]The facts in this case were vigorously contested. The district judge's findings were given orally in open court. Our statement of the facts is taken both from the judge's findings of fact and a careful review of the record.

going to show you who the boss is. You is fired."[2] Berdin subsequently collected his final check from the city clerk.

Berdin filed a complaint under 42 U.S.C. sec. 1983 against Mayor Duggan and Florida City alleging, among other things, that the plaintiff had been discharged for exercising his first amendment right to speak.[3] Following a bench trial, judgment was entered in favor of Duggan and Florida City on the grounds that Berdin's speech was not protected speech since his speech did not involve a matter of public concern. Berdin then filed a motion to alter or amend the judgment or for rehearing, stating that the issue of protected speech was not specifically covered or emphasized at trial and requesting an opportunity to prove that plaintiff's speech was, in fact, protected. Agreeing that the basis of its decision had not been focused upon at trial, the district court granted the motion to take further testimony on the issue.[4]

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[2]Mayor Duggan testified that he told Berdin if the work was too much for him, then he could go home, and that Berdin voluntarily quit his job at that point. In his answer to Berdin's second amended complaint, however, Duggan asserted that Berdin was "discharged from his employment because of his poor job performance, lack of aptitude, and lack of skills." The district court found that Berdin was discharged by Mayor Duggan. (Record, Vol. 6, p. 5).

[3]Berdin went to trial on his second amended complaint. In that complaint, he sued in four counts pursuant to 42 U.S.C. sections 1981 and 1983, the First and Fourteenth Amendments to the United States Constitution, and the Laws of the State of Florida. For the purposes of this appeal, only the claim mentioned in the text is in issue.

[4]Mayor Duggan filed a motion to allow further testimony on the issue of whether plaintiff was fired by Duggan. The district

According to the testimony of Berdin and several homeowners, the streets, trees, lawns, and public facilities fell into general disrepair after 1973 and continued in such a state through 1974. The record indicates that Berdin received complaints from citizens regarding the poor conditions of the streets and lawns, citizens appeared at City Hall to voice complaints, and Berdin complained to Commissioner Thompson and requested more men for the maintenance crew. Mayor Duggan testified that the streets and lawns were in good condition, there was ample manpower on the maintenance crew, and that he received no complaints about the condition of the streets and lawns.

Finding Berdin's speech to be a matter of public concern, the district court concluded that the speech was constitutionally protected and entered a final judgment in favor of Berdin and against both defendants. This judgment included damages for back pay less money earned elsewhere, costs, and attorney's fees. Minimum punitive damages were also awarded against defendant Duggan. Both defendants filed motions for new trial, which were denied.

The present appeal followed, with the plaintiff filing a notice of cross-appeal on the issue of the award of punitive damages and attorney's fees. We conclude that the judgment of the district court should be affirmed.

(Footnote 4 Continued)

court denied that motion on the grounds that the defendants had not been surprised by the development of that issue. Rather, the district court noted that it had been the defendants' position all along that Berdin was not fired. (Record, Vol. 6, p. 4).

Protected Speech

[1] In order for Berdin to succeed on the merits, he must demonstrate that his remarks at the baseball field were a motivating factor in the decision to terminate[5] and that those remarks were constitutionally protected.[6] Once the employee has shouldered this burden, the burden of proof shifts to the government to show by a preponderance of the evidence that it would have reached the same decision to discipline the employee in the absence of the protected speech.[7] *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Paschal v. Florida Public Employees Relations Commission*, 666

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[5]There is no dispute between the parties regarding the reason for Berdin's discharge. The parties agree that Berdin's employment with the city ceased as a result of his interchange with Mayor Duggan at the baseball field. Moreover, the causation issue is a question of fact, and thus we are bound by the clearly erroneous rule when reviewing the district court's finding that the speech "was a substantial factor in this man's being fired." (Record, Vol. 6, pp. 5, 6). *See Van Ooteghem v. Gray*, 654 F.2d 304, 305 (5th Cir.1981) (en banc), *cert. denied*, 455 U.S. 909, 102 S.Ct. 1255, 71 L.Ed.2d 447 (1982).

[6]Whether an employee's speech is constitutionally protected is a question of law, and thus we are not bound by the district court's finding on this issue. *Bickel v. Burkhart*, 632 F.2d 1251, 1256 (5th Cir.1980).

[7]The district court noted that the *Mount Healthy* inquiry of whether the defendants have demonstrated that the plaintiff would have been fired even in the absence of the constitutionally protected conduct is not a viable consideration in the context of this case since the defendants have taken the position that Berdin was not fired. (Record, Vol. 6, p. 6).

F.2d 1381 (11th Cir.), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2911, 73 L.Ed.2d 1319 (1982). Because of the peculiar facts of this case, the only inquiry we need address with regard to Berdin's basic first amendment claim is whether his speech was constitutionally protected.

[2] Whether a public employee's speech is constitutionally protected is determined by a balancing of the employee's interest in free speech and the state's interest in promoting the efficiency of the public services performed through its employees. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). This balancing test applies equally to private and public expressions by a public employee. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

[3] Prior to *Givhan*, the cases involving a public employee's right of free speech dealt with public expressions by the employee. In *Givhan*, a school teacher was dismissed after privately complaining to the principal about certain policies and practices of the school which she perceived to be racially discriminatory. Striking the *Pickering* balance in favor of the employee, the Supreme Court held that the teacher's criticisms of school policy were protected notwithstanding the private nature of the communication. Thus, the fact that Berdin's expression was directed to Duggan privately[8] does not

[8]Although the evidence shows that at least one co-worker heard the exchange between Berdin and Duggan, the speech was ostensibly a private expression rather than a public one since it was directed toward Duggan personally and took place at a time when the chance of being overheard by the public was minimal.

render his speech outside the purview of the first amendment.

[4] Applying the *Pickering* test involves considerations such as whether the speech was directed toward a person with whom the employee would normally be in contact in the course of his daily work, whether the statements tended to interfere with internal discipline or harmony among co-workers, and whether the speech concerned a matter of public concern. Where private expression is at issue, the Supreme Court has indicated that the time, place, and manner of the speech are to be weighed in the *Pickering* calculus.[9] *Givhan*, 439 U.S. at 415 n. 4, 99 S.Ct. at 696, 58 L.Ed.2d at 624.

[5] In the instant case, Berdin and Duggan did not normally come in contact during the course of their daily work. No close working relationship existed between this maintenance crewman and the town mayor, and both parties testified that no anger or hostility existed between the two. Further, there was no evidence that Berdin's speech resulted in an internal discipline problem or disharmony among co-workers. Rather, Berdin's onlooking fellow workers continued work as usual.[10] Finally, the district court found, based on the testimony and credibility of the witnesses, that Berdin's speech

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[9]This is in addition to the *content* of the speech, the main focus in a public expression. *Givhan*, 439 U.S. at 415 n. 4, 99 S.Ct. at 696, 58 L.Ed.2d at 624.

[10]Duggan stated in his deposition that no disruption of work occurred. (Deposition of John Duggan at 21). The district court stated, "This simply is not one of those cases of public employee bickering, continued unrest." (Record, Vol. 6, p. 5).

was a matter of public concern. While the specific words may not seem important to the public at large, after independent evaluation of the record, we do not find the district court's ruling that the evidence supported a finding of public concern to be clearly erroneous.[11] Consequently, Berdin's criticism of Florida City's maintenance practices is not unlike Givhan's criticism of Western Line's school policy. Both speakers felt strongly enough about the subject matter to personally confront their employer. Thus, we find that under the circumstances of this case the city's interest in efficiency of services does not outweigh the interest of the public employee in free speech and that the speech is constitutionally protected.

Duggan's Qualified Immunity

[6] Mayor Duggan asserts that his action of firing Berdin[12] is protected by a qualified immunity.[13] Certainly, a qualified immunity does exist for certain executive officers for discretionary acts performed in the course

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[11]*See also Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982) ("[T]he first amendment's protections do not turn on the social worth of the statements, saving a few exceptions . . ."). *Id.* at 837; *Hanson v. Hoffman*, 628 F.2d 42 (D.C. Cir. 1980); *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980).

[12]This is an alternative argument since Duggan continues to maintain that Berdin quit his job.

[13]Qualified immunity is an affirmative defense and thus must be asserted by the defendant. *Williams v. Treen*, 671 F.2d 892, 896 (5th Cir. 1982). Here, Duggan injected this issue into the lawsuit by making it the basis for his motion for summary judgment and accompanying memorandum of law.

of official conduct. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). However, the defense of qualified immunity is unavailable to government officials who, though otherwise covered, act in such a manner as to be violative of clearly established statutory or constitutional law. *Harlow v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

[7] The disciplining of a public employee, for exercising his first amendment right to speak, clearly contravenes established law. *See Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). In *Harlow*, the Supreme Court stated that where

> the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.[14] . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

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[14]Here, Duggan merely propounds the conclusory argument that he acted in good faith. He does not argue "[unawareness] of a constitutional right that had not yet been declared." *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1979). Moreover, this court has recently stated that "[a] bald assertion that the acts were taken pursuant to the performance of duties and within the scope of duties will not suffice." *Espanola Way Corporation v. Murray Meyerson*, 690 F.2d 827 (11th Cir. 1982).

Harlow 102 S.Ct. at 2739 (footnote supplied). Accordingly, we find that Duggan should have known in 1974 that his action of firing Berdin was an impermissible exercise of his discretionary power,[15] violative of this employee's first amendment rights.

Florida City's Immunity

[8] In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a municipality is liable in a section 1983 action only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." 436 U.S. at 694, 98 S.Ct. at 2037. The municipality may not assert the good faith of its agents as a defense to the liability. *Owen v. City of Independence, Missouri*, 445 U.S 622, 100 S.Ct. 1398, 68 L.Ed.2d 673 (1980). Thus, the inquiry becomes one of whether Florida City had any policy, ordinance, or regulation that could fairly be said to represent official policy granting the mayor the authority to fire public employees.

Florida City maintains that the existence of any such policy is "unknown to the appellant, City." Brief of City of Florida at 19. Florida City Ordinance 73-1, however, grants the mayor authority over city employees with the power to hire and fire. The ordinance imposes no limit on the mayor's discretion. Established by the

[15]Duggan stated in his deposition that no limitations were placed on his discretion in the hiring and firing of city employees. (Deposition of John Duggan at 17).

City Council, Ordinance 73-1 was later ratified by the town residents in an election as Resolution 73-2.[16]

[9] Florida City also argues that Duggan was not the final authority of administrative decisions but, rather, was answerable to the City Commission. The question of whether the city delegated to the mayor the final authority to make personnel decisions is a question of fact for the trial judge in the first instance. *Hearn v. City of Gainesville*, 688 F.2d 1328, 1334-35 (11th Cir. 1982); *Schneider v. City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980). We note the district court's finding that "the mayor was clothed with the authority to actually make the firing decision. Not only is this clear from the evidence of the authority that had been granted him under the type of government that the city operated, but because the evidence otherwise shows that all it took was the mayor to say, 'Get your stuff and go, you are fired,' that is what happened and the city closed him out." (Record, Vol. 6, p. 9).

[10] A district court finding, explicit or deemed, is measured under Rule 52(a) and rejected only "when although there is evidence to support it, [we are] left with the definite and firm conviction that a mistake has been committed." *Hearn v. City of Gainesville*, 688 F.2d at 1335 (citations omitted). We agree with the district court that Duggan's actions constituted the

[16]This ordinance eliminated the city-manager type of government existing in Florida City prior to 1974. *See, e.g.*, Deposition of John Duggan, pp. 4-6.

official policy of Florida City within the meaning of *Monell*.[17]

Other Issues

After a review of the record, the findings and conclusions of the district court, and the briefs of the parties, we find the other issues raised by defendants

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[17]In *Monell*, the Supreme Court stated:

> [A]lthough the touchstone of the section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other section 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Monell, 436 U.S. at 690-91, 98 S.Ct. at 2036.

We would also note the absence of any evidence by Florida City regarding the City Commission's power to overrule the personnel decisions of the mayor. *See Bowen v. Watkins*, 669 F.2d 979, 989-90 (5th Cir. 1982) ("If a high official has the power to overrule a decision but as a practical matter never does so, the decision-maker may represent the effective final authority on the question. Finally, even if there is an appeal of an action but the appellate body defers in substantial part to the judgment of the original decision-maker, the original decision may be viewed as the government's policy.").

devoid of merit.[18] Likewise, we reject plaintiff's contentions on cross-appeal.[19] The judgments of the district court are AFFIRMED.

[18]Duggan argued on appeal that, contrary to the district court's specific finding, Berdin quit his job. Florida City argued that the trial court improvidently granted Berdin's motion to allow further testimony, erred in its failure to grant the city's motion to dismiss, erred in not treating the city's motion to dismiss as a motion for summary judgment and not granting the latter, and erred in allowing testimony regarding Berdin's attorney's fees after Berdin had rested his case.

[19]Berdin argued that the award of punitive damages and attorney's fees was inadequate.

[FILED JUN 13 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5259

THOMAS BERDIN, Et. Al.,

Plaintiffs-Appellees, Cross-Appellants,

versus

JOHN DUGGAN, Et. Al.,

Defendants-Appellants. Cross-Appellees.

Appeal from the United States District Court for the Southern District of Florida

ON PETITIONS FOR REHEARING

(June 13, 1983)

Before HILL, CLERK, Circuit Judges, and SCOTT*, District Judge. PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, Sitting by designation.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 76-645-Civ-JE

THOMAS BERDIN,

Plaintiff,

vs.

JOHN DUGGAN, etc.,

Defendant.

Before:

HON. JOE EATON,

United States District Judge

Miami, Florida

October 30, 1980

Findings and Conclusions

APPEARANCES:

JOEL V. LUMER, Esq.,
On behalf of the plaintiff,

JOSEPH F. TOMASSI, Esq.,
On behalf of the City,

BERTRAM SAPURSTEIN, Esq.,
On behalf of Defendant Duggan.

THE COURT: Good afternoon.

This is the second time around for the Court to announce findings and conclusions in this case. It might be well now to put the history down in one location in the file.

Some time early in the history of this litigation there was some rather brief reference made by one or both of the defendants in a motion to dismiss where the point was advanced that the plaintiff's speech, statements which the plaintiff alleged caused him to get fired, were not protected speech. Plaintiff's speech was not protected speech within the First Amendment because as briefly urged, it was not a matter of public concern.

As the case went along no stress was placed upon that position. The motion was denied, properly so, because whether or not it was protected speech could not have appeared and was not required to be set out factually in a complaint, so it was a matter for evidentiary consideration. The motion was thus properly denied.

Thereafter, as I have just said, there was no stress really laid upon that proposition during the preparation for trial. It was not a focal point of the litigation at all. As a matter of fact my recollection is that it wasn't a part of the pretrial stipulation and considerations. And as the Judge came to consider the evidentiary record following the trial he began to find himself zeroing in on the question of whether or not the plaintiff's speech was in fact protected, whether or not it was in fact of public concern. After much thought and considerable research, the Court concluded that it was not, on the basis of the record that had been made.

The Judge therefore announced findings of fact, which in essence were such that the Court found that the plaintiff's speech was not protected speech within the First Amendment. A rather long discourse, the findings and conclusions was, and then the plaintiff raised what I thought was a good point.

He suggested that the Court come out of the blue on that, that he had not really directed his attention toward it, for the reasons that I have heretofore expressed in this findings and conclusions today and he ought to have a right to reopen the case and to have attention directed factually to that situation and the Court thought that in all fairness he should have that opportunity, it really having been something that the Court grasped without having first put plaintiff on notice of the importance of it in the mind of the Court.

So we allowed, under the rule, we allowed the plaintiff to reopen the case.

The defendants then said that if the plaintiff is going to reopen the case they ought to have a right to reopen it on the question of whether or not the plaintiff had actually been fired or whether he had quit.

Well, that was denied for the very obvious reason that that had been the defendant's position throughout the proceeding. They had not been surprised at all by the development of that issue. It was in the forefront of their position. As a matter of fact their position has always been that the man was not fired.

So we did reopen the matter. We did take further testimony, and we are now here for the findings of fact and conclusions of law on the case as completed following the reopening which was allowed.

We should mention that it is still necessary for the Court to make a finding as to whether or not the plaintiff was in fact fired as the result of or as the proximate result of his exercise of his First Amendment rights as disclosed in this record. So we do not abandon the finding made in that regard previously and we do here specifically find that he was fired as the proximate result, as a direct result of his exercise of his First Amendment right.

Now, we first talk about, in making the new findings, the Pickering test, Pickering versus Board of Education, 20 Law Ed. 2d 811.

It is, of course, clear by accepting public employment one does not forego his right to comment on matters of public concern.

Thus, the plaintiff was constitutionally protected. The very conduct that was a substantial factor in the decision, the defendants, mayor and city's decision to fire him, the scales of the balance fashioned by the Supreme Court in Pickering weigh in the plaintiff's favor.

This simply is not one of those cases of public employee bickering, continued unrest. No such relationships existed as to, that is between this plaintiff and the mayor and the city, to place the plaintiff in any position other than an employee, a laborer.

The scope of his speech was limited. We mention the Pickering test only because we want whoever may read this some day to know that the Court was aware of it and balanced it, but there is no problem there as to balancing it.

Of course, the next consideration is not even viable here but one that ordinarily is made in these cases, is that whether or not the defendants have demonstrated that plaintiff would have been fired even in the absence of the constitutionally protected conduct. That has not been the defendant's position at all. They having taken the position that they didn't fire him because of the precise First Amendment rights.

Now, the evidence which was presented after the cause was reopened under the rule is such as to cause the Court to now find that the speech, which was a substantial factor in this man's being fired, was in fact of public concern and the Court does find that, and thus

the Court finds that the plaintiff's speech was in fact constitutionally protected under the First Amendment.

We then turn to the question of back pay. We find that had plaintiff not been fired, had he remained in the employment of the city, he would have received the sum of $25,662.13.

Now, because an employee who is fired for the exercise of First Amendment rights has a duty to mitigate back pay awards, the Court finds from the evidence in this case as follows: In 1974 the evidence shows and the Court finds plaintiff earned outside of his employment with the City the sum of $4,048. We find that in 1975 he earned $2,440. We note that he was dismissed by the City on April 10, 1974.

So that the remainder of 1974 he earned that figure of $4,048. He earned $2,440 in 1975. He earned $2,400 in 1976, and in 1977 he earned $2,000 prior to the time that he elected to "go on" social security.

Thus the Court finds that in mitigation of back pay award, plaintiff has earned a total of $10,888.

To go back a moment and to talk about back pay accumulated sums.

From April, 1974 to October 1st, 1974, he would have earned $3,057.75.

Then until October 1st, 1975, he would have earned $6,835.10.

To October 1st, 1976 he would have earned $7,179.64, to October 1st, 1977 he would have earned $7,897.76, and from October 1st, 1977 to November 1st, 1977 he would have earned $691.88.

Those figures accumulate to the total just previously announced of $25,662.13.

When one subtracts the amount earned in mitigation of the back pay amount from the back pay the amount he would earn had he not been dismissed, we find that the plaintiff is entitled to recover the sum of $14,774.13.

We then turn to the question of who is liable.

The City itself is liable for the back pay award.

The mayor individually is liable for the back pay award. Of course this is joint and several liability. The mayor is liable because under more recent cases, though they were not in effect, though they were not on the law books at the time of the happening of this event, I have particular reference to the City of Independence, Missouri, the mayor was clothed with the authority to actually make the firing decision. Not only is this clear from the evidence of the authority that had been granted him under the type of government that the City operated, but because the evidence otherwise shows that all it took was the mayor to say, "Get your stuff and go, you are fired," that is what happened and the City closed him out. So the evidence shows that the decision makers themselves, or more specifically stated, the decision maker himself, is the defendant in this case.

So this does not present a question simply of whether or not the City is liable for the acts of city employees or whether a city employee is either. I may have this a little bit backward in this announcement but you know what I mean from reading these cases. The mayor is liable. He did the firing. The City is liable under the City of Independence because of the mayor's having been clothed with that total authority by the City, which he exercised.

So whether he would, the City would or would not have been liable as that case was instituted is not now the question.

The City is liable now because this is being announced at this time, taking into consideration the state of the law as of this point.

The City of Independence case also covers and takes care of the good faith defense because that case makes it clear that notwithstanding that this happening was a good long while ago that that defense is not presently available and under the facts of this case it was not.

As to punitive damages. We recognize that punitive damages, if they can be awarded at all under these circumstances in equity by affording people back pay, and I believe under the law that they can, as against the mayor, and only against the mayor, we realize that punitive damages are awarded not only as an punishment, and I am using the language of the law, of the actor himself but also as a deterrent to others, realizing that this happened a long time ago and before the development

of case law that made it pretty clear that this sort of firing is likely to subject somebody to damages, and because the mayor, and I use the term mayor, I mean the mayor as of the time of the events, he is not now the mayor, because the mayor is not now the mayor and because he never may again be the mayor of anything, and in consideration of the amount of the recovery and all of the circumstances surrounding this event, punitive damages are assessed individually against the individual defendant in the amount of $1,475.

There remains, I believe, the question of an amount of reasonable attorney's fees. If I get some sort of letter saying you would like to set that down I will set that down as soon as I can. I believe that that should be a part of any final judgment, so the Court does announce that back pay in the amount of $14,774.13 is awarded the plaintiff, joint and several obligation of the defendants, punitive damages assessed against the individual defendant in the amount of $1,475.

As further findings, to demonstrate why the cut off point of November 1st, 1977, the Court announces as follows. If the plaintiff was not in the gambling business before then, he was as of that time. His earnings were such as to entitle him to no further back pay awards after that date. He was substantially involved in the bolita operations down in that area. He did in fact elect to go on social security. There is no showing that he would not have done so had he not been fired several years before.

We begin with the factual circumstance that, number one, he did.

Number two, it cannot be said from this evidence that he would not have, and the evidence preponderates in the direction that he would have because he needed time to engage in the gambling business, and had he been out raking ball yards he would not have had that time, thus the Court finds that he did in fact subsequent to that cut off date, was on social security and would have been had he not been fired and had he remained with the City up until that date, and he is not entitled to recover subsequent to that date from these two defendants.

You give me a letter and we will set you down for attorney's fee considerations.

Thank you, gentlemen.

(Thereupon the hearing was adjourned.)

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, RUTH M. FEATHERSTONE, Official Court Reporter, do hereby certify that I was authorized to and did report the proceedings in the above styled case; that pages numbered 1 to 12, inclusive, constitute a true and correct computer aided transcription of my stenographic notes in the cause heard before The Honorable JOE EATON, United States District Judge, and jury, at the time and place herein specified.

DATED at Miami, Dade County, Florida, this 17th day of November, 1980.

[FILED JUL 28 1978]

[RECEIVED JUL 31 1978]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-645-Civ-JE

THOMAS BERDIN,

Plaintiff

-vs-

JOHN DUGGAN, et al.,

Defendants

ORDER

THIS CAUSE is before the Court on Defendants' Motion for Summary Judgment.

After consideration of the complaint, the record in this cause and the memoranda of the parties, the Court denies the Motion for Summary Judgment.

Issues of fact still before the Court are whether Defendant Mr. Duggan dismissed Plaintiff Mr. Berdin

and if so whether the dismissal was in the good faith exercise of Defendant Mr. Duggan's executive duties.

Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is denied.

DONE AND ORDERED at Miami, Southern District of Florida, this 28 day of June, 1978.

/s/ Joe Eaton
United States District Court

cc: Joel V. Lumer, Esq.
Bertram Sapurstein, Esq.